United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original. Affidavit of Mailing

74-2121

To be argued by
JOAN S. O'BRIEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2121

UNITED STATES OF AMERICA,

Appellee,

—against—

FRITZ EMANUAL BASTIAN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Preliminary Statement

Fritz Emanual Bastian appeals from a judgment of conviction entered on August 2, 1974, after trial by jury in the United States District Court for the Eastern District of New York (Platt, *J.*), which judgment convicted him of armed bank robbery under Title 18, United States Code, Section 2113(d). Appellant was sentenced to a term of imprisonment of 12 years under Title 18, United States Code, Section 4208(a)(2). Appellant is presently incarcerated.*

On appeal, appellant contends (1) that his confession and other evidence were the "fruit" of an illegal arrest or alternatively an illegal detention and hence, excludable, and (2) that he was deprived of his right of confrontation when a Government witness was allowed to assert his Fifth Amendment privilege on one question during cross-examination.

* The co-defendants Larry Coates and Larry Derrick, who entered pleas of guilty and testified as Government witnesses in further trials, are presently incarcerated and awaiting sentence.

Statement of Facts

At trial, the Government's case relied not only upon the evidence of appellant's confession but also upon the testimony of the accomplice Larry Derrick (Tr. 368-426) and the eyewitness identification of Leonard Silberman and Ethel Jones (Tr. 320, 348-349, 358).

(1)

On December 12, 1973, Fritz Emanual Bastian, together with Larry Coates and Larry Derrick, entered the National Bank of North America on Rockaway Boulevard, Queens, New York (371, 372).* According to the robbery plan, appellant, the first to enter the bank, waited outside a platform area of the bank, pretending to open a bank account until he was buzzed into the area (310, 311, 375-376). Appellant thereafter displayed his .45 automatic revolver, removed a gun from a bank guard (376, 411) and approached Leonard Silberman, the Assistant Manager, informing him that a holdup was in progress (310-311). Pursuant to appellant's instructions, Silberman walked to the teller's area of the bank while appellant held a revolver to his head, clicking the gun's safety catch on and off (311). When they arrived at the teller's area, appellant gave one teller a brown paper bag, instructed her to fill it up with "fifties and hundreds", while Silberman and the other tellers were told to lie on the floor (311, 355-358). Derrick, standing in front of the tellers' windows thereupon received the bag which was filled by the one standing teller (377). Thereafter, appellant, Coates and Derrick exited the bank and entered into a car driven by another co-defendant Arthur Mitchell (377-378). They returned to a store of Daniel Staley (another co-defendant) with whom they planned the robbery) and split the money equally (378). The loss to the bank was $17,038 (317).

* Page numbers in parentheses refer to trial transcript.

(2)

On January 9, 1974, New York City Police Detectives George Alleyne and Delphin Greene received a telephone call at approximately 3:45 P.M. from a previously reliable confidential informant (157, 187-188). The informant had been reliable in the past by supplying the detectives with information which resulted in four arrests for bar and supermarket robberies within the year preceding this tip. Of the four arrests, three had led to convictions, with one case still pending. The informant was not a defendant himself in any case but was paid about $500 for this and other information (198, 203-209). The informant told the detectives that "Tall Larry" and "Fritz" * had committed the bank robbery at the National Bank of North America the previous month and that they were presently at a delicatessen on 150th Street and South Road, Jamaica, Queens. The informant further identified the clothing that the two would be wearing (157, 171, 187-188, 202).

The detectives immediately proceeded to the delicatessen and observed therein two individuals matching the physical description given to them and wearing the clothing as described by the informant (158, 188). As the detectives drove by the delicatessen, both individuals looked out of the delicatessen in the direction of the police officers and immediately exited the premises in different directions (158, 188-189). Appellant was apprehended, handcuffed and placed in the squad car (189). Coates was also apprehended and brought with appellant to the 112th precinct in Forest Hills at approximately 5:10 P.M. (160, 189). Upon their arrival, appellant was placed in a holding cell while Coates was placed in another portion of the same room which contained this holding cell (161, 188-189, 126-127).

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* Detective Alleyne recalls that the names "Colts" and "Fritz" were used by the informant (171).

The detectives and other members of the Queens Robbery Squad then proceeded to go through various bank robbery files (161-162, 190-191). One surveillance photograph of another bank robbery depicted a robber strongly resembling Larry Coates. This photograph was shown to Coates and he admitted to being the perpetrator in the photo (191). By this time, F.B.I. agents Danny Coulsen, Robert McCartin and James Swayze were at the precinct having arrived at approximately 7:00 P.M. (126, 191, 74). Coates was given his constitutional warnings and he thereafter gave a complete statement as to his participation in the bank robbery and of appellent's participation (128, 191-192). During the time in which the police were searching their files and the F.B.I. agents were speaking to Coates, no one was observed to have approached appellant in the holding cell (162, 192).

Shortly thereafter, at approximately 9:30 P.M., Agent Coulsen approached appellant, identified himself and advised him of the fact that the agents thought him to be involved in the robbery of the National Bank of North America (82). Coulsen presented appellant with an F.B.I. *Miranda* waiver of rights form and asked appellant to read it aloud to him. Appellant did so and further responded that he understood it (83). He also signed the form and told Coulsen that he wanted to talk about the robbery (83). Appellant thereafter gave a complete oral confession of his participation in the robbery which statement was subsequently reduced to writing and signed by the appellant (85, 131-135, 431, 433-435). The interview was completed at 10:09 P.M. (136).

Because of the late hour, a United States Magistrate was not available and appellant was taken to the F.B.I. headquarters on 68th Street in New York City (91). While at headquarters, F.B.I. agents removed from appellant's hatband two pieces of a one-dollar bill (103, 116). Appellant

told the agents that when the money from the robbery was divided, there were a few bills remaining that could not be divided equally. For luck, the bills were torn in half so that each participant could have a memento of the crime (104-105, 117). Appellant was lodged in West Street at 1:15 A.M. that morning (95).

At the suppression hearing, appellant, an addict at the time of questioning, alleged that while in the holding cell, he began to visibly suffer withdrawal symptoms and requested medication (21). He claimed that a police officer ignored his condition because he would not "cooperate" (22-25). He asserted that he later made up a story as to his participation in the robbery and signed a statement for Agent Coulsen because of his physical condition and need for medication (31-34). Detectives Alleyne (160, 163, 168, 178-179) and Greene (192-194, 219-220) as well as Agents Coulsen (83-84, 96, 138-140, 154) and McCartin (112), all denied that they had ever observed appellant suffering any withdrawal symptoms or that he ever indicated his need for medication. Coulsen testified that Bastian merely told him that he "chip[s] a little sometimes" (139, 154), but was very calm during the interview and had even finished a sandwich and a coke (139-140). After the suppression hearing the Court found that it was:

> "... not persuaded in any way, shape or form that this confession or statement was involuntary.
>
> I am taking into consideration Mr. Bastian's detailed description of his conversation with Officer A and Officer B—who said what to whom—and what they said to him and so forth. By his own testimony at this pre-trial hearing that we have had, I find it difficult to believe that [Bastian] was in the state of distress that he claims to have been in to have the remarkable memory of all of those details that he claims that he had. I am not persuaded that a four-

hour—if it could be that much—detention in an open cell in the Police Department while awaiting the arrival of the FBI and the FBI's first questioning of one of the other defendants prior to questioning him constitutes a detention which forced a confession. So that quite apart from the legality of the arrest, I feel that the confession was voluntarily made. It was so stated by the defendant to be a voluntary confession in his own handwriting on Exhibit 1. He admitted it was his handwriting and that he wrote it. I am fully aware of the fact that he claims he was not aware of what he was doing when he did it. I find that very hard to believe. My feeling is that your motion should be denied and I think the other motions necessarily follow in logical sequence" (299-300).

ARGUMENT

POINT I

The district court properly admitted into evidence appellant's statements, the torn dollar bills and the eyewitness identification.

Appellant contends that he was unlawfully arrested by the New York City detectives. He urges that there was no probable cause for the arrest under *Aguilar* v. *Texas*, 378 U.S. 108 (1964). From that premise he urges that the events following the arrest, as well as the evidence derivatively obtained, were all tainted and, therefore, inadmissible in evidence. *See Wong Sun* v. *United States*, 371 U.S. 471 (1963). Alternatively, appellant urges that, under the *McNabb-Mallory* Rule as codified in Title 18, U.S.C., § 3501(c), his confession was obtained during an unlawfully extended period of detention prior to arraignment.

Appellant's contentions are without merit. In brief, the Government believes that the arrest of appellant and his confederate Coates was predicated upon sufficient probable cause and furthermore, that the validity of the detectives' initial arrest is irrelevant in light of the undisputed probable cause possessed by the F.B.I. agents at the time of the questioning. The Government further contends that there was no unnecessary delay in bringing appellant before a Magistrate.*

A. The detectives had sufficient probable cause to arrest appellant.

As to the first argument, appellant contends that although the detectives ** had sufficient evidence of the informant's reliability,*** they did not ascertain the basis of

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* At the suppression hearing appellant's main contention was that his confession was coerced by the authorities who refused to supply him with the necessary medication to end his withdrawal pains (22-25). Judge Platt found that he was not "persuaded in any way, shape or form that the confession . . . was involuntary" or that Bastian was "in a state of distress" (299).

** The Government concedes that appellant was arrested by the detectives regardless of the conflicting intentions of the detectives (173-177, 189).

*** Appellant does not challenge the officers' good faith in relying on the evidence of the informant or their trustworthiness in testifying about the informant and his report. The Court found their testimony to be trustworthy (298-299). Accordingly, the Government was not required to disclose the identity of the informer since his identity had no bearing on the ultimate issue of guilt or innocence. *McCray* v. *Illinois*, 386 U.S. 300 (1967); *Scher* v. *United States*, 305 U.S. 251 (1938); *Roviaro* v. *United States*, 353 U.S. 53 (1957); *United States* v. *Harris*, 403 U.S. 573 (1971). Indeed, the only reason elicited by counsel for the informant's name was to ascertain the informant's motivation in conveying information to the police or if there was "something that might have some bearing on [the] case" (292). In any event, the Government did offer to supply the informant's name and circumstances surrounding his report to the police to the

[Footnote continued on following page]

the informant's knowledge as required by *Aguilar* v. *Texas*, 378 U.S. 108 (1964). He argues, therefore, that they lacked the sufficient probable cause to arrest and, accordingly, that the subsequent statements (as well as the photographic identification and the portion of dollar bills found in the hatband) were inadmissible as fruits of the illegal arrest. *See Wong Sun* v. *United States*, 371 U.S. 471 (1963).

Concededly, the record does not reveal the basis of the informant's knowledge which was required in *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969). However, the informant's present report was not only supported by his lengthy history of reliability,* but by the corroborating observations of the officers, which observations aided in establishing sufficient probable cause. *Draper* v. *United States*, 358 U.S. 307 (1959); *Jones* v. *United States*, 362 U.S. 257 (1960); *United States* v. *Harris*, 403 U.S. 573 (1971); *United States* v. *Canieso*, 470 F.2d 1224 (2d Cir. 1972); *United States* v. *Acarino*, 408 F.2d 512 (2d Cir.), *cert. denied*, 395 U.S. 961 (1969).

Court *in camera* in the absence of appellant and his counsel (198, 291). *See United States* v. *Hurse*, 453 F.2d 128 (8th Cir. 1971), *cert. denied*, 414 U.S. 908 (1973); *United States* v. *Jackson*, 384 F.2d 825 (3d Cir. 1967), *cert. denied*, 392 U.S. 932 (1968); *cf. United States* v. *Comissiong*, 429 F.2d 834, 839 n. 8 (2d Cir. 1970) (suggesting *in camera* interview of informant); *United States* v. *Ortega*, 471 F.2d 1350 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973) (*in camera* proceeding used in District Court). Appellant's counsel, however, merely reiterated his request for the informant's name (291-292) and the Court declined to follow that procedure (292).

* The Court held that the informant's "reliability factor [was] more important than his detailed knowledge of what happened at the bank itself" and that the Government's proof was therefore sufficient on the issue of the illegality of the detectives' arrest (298-299).

As in *Draper* v. *United States, supra,* the informant not only supplied the police with the names of the two perpetrators, but also gave a detailed description of their clothing * and their present location. The detectives immediate observation of the two individuals at the given location corroborated the informant's description of their physical characteristics and identity. Additionally, the actions of the two individuals in fleeing when they observed the police also lend support to the informant's tip (158, 188-189). *See United States* v. *Heitner,* 149 F.2d 105, 107 (2d Cir. 1945); *United States* v. *Soyka,* 394 F.2d 443, 453 (2d Cir. 1968), *cert. denied,* 393 U.S. 1095 (1969). Thus, the detectives had sufficient corroborating evidence to establish probable cause and they lawfully arrested the appellant.

B. Appellant's confession, the torn dollar bills and the eyewitness identification were not "fruits" of the initial arrest.

Assuming *arguendo* that the police detectives lacked probable cause to arrest, appellant's statements are admissible because they were not causally related to his detention at the time they were made but rather were the product of his observation of Coates' confession and his own intervening act of will. Furthermore, the validity of the detectives' arrest is irrelevant since the F.B.I., at the time of questioning, had already received sufficient evidence independent of the detectives' original tip upon which to authorize appellant's commitment, thus dissipating any original taint.

Clearly, statements derived "immediately from an unlawful entry and unauthorized arrest" are inadmissible.

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* The informant told Detective Greene that "Larry" wore a wide brim red hat with a white band, red plaid pants and platform shoes and had a "brown-skinned" complexion. Fritz was described to wear a wide brim black hat and other clothing which Detective Greene could no longer remember (188, 202-203).

Wong Sun v. *United States*, 371 U.S. 471, 485 (1963). However, even if there exists some causal connection between the arrest and the statements, the statements can be admitted if they were not arrived at by the authorities' exploitation of that initial illegality or if the connection between the arrest and the statement were so attenuated as to dissipate the taint of the primary illegality. *Id.* at 487-488. In *Wong Sun*, the statements made by a defendant to six or seven officers in his own bedroom (in which his wife and child were sleeping) immediately following an unlawful arrest were found to be so intimately bound to that arrest as to be the fruit of the illegal arrest. *Wong Sun* v. *United States*, *Id.* at 486. The Court also found that the defendant's statements were not an "act of free will" which might have purged the primary taint of the unlawful arrest. *Id.* Additional statements made by a defendant after he had been released, however, several days later, at a time in which he voluntarily appeared at F.B.I. headquarters were found by the Court to have been so "attenuated" from the original illegal arrest as to "dissipate" the taint. *Id.* at 491.

Here, appellant's statements were not the result of his arrest and detention but the result of his knowledge of Coates' statements.* There is no evidence that the police in any manner exploited the fact of appellant's arrest. With or without his arrest, the police would have ascertained Coates' participation in bank robbery, received Coates' incriminating statements and arrested appellant on the basis of them. The arrest and detention of appellant merely served to provide him with a first hand observation of Coates' confession.

Furthermore, appellant's confession was a product of the intervention of appellant's free act of will. Although

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* Appellant has no standing to allege a violation of a co-defendant's constitutional rights. *United States* v. *San Martin*, 469 F.2d 5, 8 (2d Cir. 1972), *cert. denied*, 410 U.S. 934 (1973).

Wong Sun, supra, does not specifically rest its holding on the finding of coercive circumstances (371 U.S. at 486 n. 12), it did mention that a free act of the will might cure the primary taint. 371 U.S. at 486. Subsequent cases have found that where the detention is free from coercive circumstances, warnings have been given, there is a reasonable time between the arrest and the statement and there is evidence which would explain defendant's motivation in confessing, the taint is removed since the statement is the result of a clear intervening act of defendant's free will. *United States* v. *Burke,* 215 F. Supp. 508 (D. Mass. 1963), *affirmed,* 328 F.2d 399 (1st Cir.), *cert. denied,* 379 U.S. 849 (1964); *Rogers* v. *United States,* 330 F.2d 535 (5th Cir.), *cert. denied,* 379 U.S. 916 (1964); *United States* v. *Cassity,* 471 F.2d 317 (6th Cir. 1972), *cert. denied,* 411 U.S. 947 (1973). Here, appellant was not suffering from any withdrawal symptoms, nor was he coerced or harassed in any manner. He was placed in a holding cell and ignored until his interview at 9:30 P.M. (162, 192). His statement was given pursuant to complete *Miranda* warnings about four hours after his arrival at the police station. The completeness of the statement itself and appellant's care in initialling corrections (429, 431-438) also evidence that the manner by which it was rendered was entirely free from oppressive circumstances. Appellant's confession was not the product of his detention or of police activity but the direct result of his awareness of Coates' incriminating statements and his desire to receive whatever benefit he might from cooperating with the authorities. In sum, his statement was the product of the intervening act of his free will.

Additionally, the validity of the original arrest is irrelevant because the statements were rendered at a time when the F.B.I. in fact had sufficient probable cause to arrest appellant being armed with the legally obtained evidence, i.e., Coates' statement and the bank surveillance

photographs. *See United States* v. *San Martin*, 469 F.2d 5, 8 (2d Cir. 1972), *cert. denied*, 410 U.S. 934 (1973). *Cf. United States* v. *Brandon*, 467 F.2d 1008 (9th Cir. 1972);* *United States* v. *Carney*, 328 F. Supp. 948 (D. Del. 1971), *affirmed*, 455 F.2d 925 (3d Cir. 1972);** *United States* v. *Paroutian*, 319 F.2d 661 (2d Cir. 1963), *cert. denied*, 375 U.S. 981 (1964);*** *Johnson* v. *Louisiana*, 406 U.S. 356 (1972).

In *Johnson* v. *Louisiana*, *supra*, a defendant was arrested, brought before a committing Magistrate and then before a lineup. He later charged that the lineup was a "fruit" of the illegal arrest. The United States Supreme Court held that the validity of the arrest was irrelevant because at the time of the lineup, appellant's detention was pursuant to the intervening commitment of the Magistrate. *Id.* at 365. Since the purpose of the Magistrate is to ascertain probable cause and to provide a defendant with his *Miranda* warnings, *Johnson*, *supra*, is equally applicable here. There is no dispute but that the F.B.I. agents had sufficient probable cause to arrest appellant once Coates had implicated him. At that time, therefore, appellant was lawfully in their custody, irrespective of the legality of his

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* In *Brandon* oral and written statements were made to Secret Service agents after the defendants had been unlawfully arrested by local authorities. Proper *Miranda* warnings had been given. The Court allowed the statements when it was discovered that the Secret Service had information as to the defendant's activities even prior to and independent of his arrest by the police.

** In *Carney*, the seizure of physical evidence was upheld even though the evidence was initially unlawfully seized. The evidence was seized on a second occasion when a proper search warrant was obtained by the means of totally independent sources.

*** In the first appeal, this Court suppressed a subsequent search with a proper warrant on the grounds that the subsequent seizure was a "poisonous fruit" of information gleaned from the prior unlawful search. *United States* v. *Paroutian*, 299 F.2d 486 (2d Cir. 1962). In the second trial, the Government was allowed to show a wholly independent source for the facts in the warrant. *United States* v. *Paroutian*, 319 F.2d 661 (2d Cir. 1963).

earlier custody. Secondly, the *Miranda* warnings were properly given and comprehended. Thus, as in *Johnson, supra,* the validity of the original arrest is irrelevant due to the existence of the lawful commitment and proper warnings. To allow appellant's wholly voluntary statement to be forever barred because of the arguably improper arrest, when overwhelming probable cause was thereafter established, would render such evidence forever "sacred and inaccessible". *See Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392 (1920); *Nardone* v. *United States,* 308 U.S. 338, 341 (1939).

In sum, the confession was not the product of an unlawful arrest.*

C. There was no unnecessary delay in bringing appellant before the Magistrate.

The final portion of appellant's argument is that the confession of the appellant was a product of an unnecessary delay and hence inadmissible. *See McNabb* v. *United States,* 318 U.S. 332 (1943); *Mallory* v. *United States,* 354 U.S. 449 (1957); 18 U.S.C., § 3501 (1970)

Without doubt, Federal Rule of Criminal Procedure 5(a) requires that an "officer making an arrest . . . take the arrested person without unnecessary delay before the near-

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* Appellant also contends that the torn dollar bills and the statements concerning them as well as the eyewitness identifications are all products of the illegal arrest. These contentions are equally without merit. Although a photograph was taken at F.B.I. headquarters as a normal part of processing, the existence of the witnesses, Silberman and Jones, was in no way a result of appellant's statements. These witnesses had already been interviewed at the date of the robbery (238, 279). The informant's statements as well as Coates' confession implicating appellant were the true independent sources of obtaining appellant's name as the robber. Although appellant's detention facilitated the obtaining of his photograph, it was not in itself a lead or a "fruit" of an arrest or detention but merely an instrument used to verify the already existing leads.

See Government's Brief at 15-16, for a discussion of the dollar bills and statements at F.B.I headquarters as "fruits."

est available [Magistrate]." To discourage law enforcement from violating this rule in order to gain a confession, the United States Supreme Court has held that any confession elicited during an unnecessary delay would be excluded from evidence. *See McNabb* v. *United States, supra; Mallory* v. *United States, supra; Upshaw* v. *United States*, 335 U.S. 410 (1948).

However, the unavailability of the committing Magistrate has been one reason that justifies a delay in arraignment and statements voluntarily given, after proper *Miranda* warnings, have been admitted in the absence of any prolonged interrogation which exploited this delay. *See United States* v. *Ortega*, 471 F.2d 1350, 1362 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973); *United States* v. *Marrero*, 450 F.2d 373, 376 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972); *United States* v. *Braverman*, 376 F.2d 249 (2d Cir.), *cert. denied*, 389 U.S. 885 (1967); *cf. United States* v. *Middleton*, 344 F.2d 78, 82 (2d Cir. 1965). Furthermore, assuming of course, that there exists probable cause for the arrest, the police may delay the arraignment for a brief period of time to further an on-going essential investigation either to confirm or contradict a defendant's guilt. *United States* v. *Vita*, 294 F.2d 524, 533 (2d Cir. 1961), *cert. denied*, 369 U.S. 823 (1962); *United States* v. *Thompson*, 356 F.2d 216, 225 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966).

Here, the arrest of Coates and appellant was initiated at 4:20 P.M. by the police detectives (157). Immediately upon their return at 5:15 P.M. the F.B.I. was notified (160, 196, 213). No further processing was undertaken by the police because they were holding appellant at that point as an accommodation for the F.B.I. agents who were to arraign appellant on federal charges. The detention after 5:15 P.M., therefore, was clearly attributed to the actions of the federal officers in a "working relationship" with local officials. *Cf. Anderson* v. *United States*, 318 U.S. 350 (1943).

Nothing in their actions, however, indicates that there was an unreasonable delay in bringing appellant to a federal Magistrate.

In the first place, Agent Coulson was unable to get to the local precinct until 7:00 P.M. (126). Clearly, beyond the normal working hours, the Magistrate was unavailable for an arraignment until the following morning (95). Secondly, the F.B.I. had spent the time at police headquarters verifying the information received by the informant by viewing bank surveillance photographs, showing photographic spreads to witnesses and by interviewing Larry Coates (127). In the intervening time in which Coates was placed in the cell (5:15 P.M.) and the time at which appellant was first interviewed (9:30 P.M.), no one questioned or even approached him in the holding cell (162, 192). Certainly, this delay preceding appellant's precinct statements was not unreasonable and it was not exploited to coerce him into a confession by a series of repeated interrogations. *Cf. United States* v. *Middleton, supra.* The brevity in which the agent received a written statement, i.e., approximately 39 minutes (128, 135-136) also attested to the fact that these statements, made pursuant to complete *Miranda* warnings, were voluntarliy rendered and not the product of any unnecessary delay.

The appellant left the precinct at 11:40 P.M. (196) and was brought to the F.B.I. headquarters for processing and fingerprinting. Here he made the statements about the nature of the torn dollar bills (100). Again the delay was not unreasonable (due to the late hour) and the search of appellant was made in the normal course of inventorying appellant's personal possessions (100-103).* There was nothing in these circumstances that indicate that the police

* The Court held that the search of the hatband "if it was a search" was voluntary (300).

exploited the delay to obtain the casual off-hand statements given by the appellant about the dollar bills.*

POINT II

The Court properly allowed the witness Derrick to invoke his Fifth Amendment rights.

Appellant further argues that the testimony of the government's witness, the accomplice Derrick, should be stricken because upon cross-examination, Derrick invoked his Fifth Amendment privilege, allegedly depriving appellant of his right to confrontation.**

At trial, Derrick testified about his participation in the bank robbery (371-379). He also stated that he had entered a plea of guilty to the crime of bank robbery which he was told carried a maximum penalty of twenty years imprisonment (368-369). Derrick also testified that in exchange for his pleading guilty he would not be indicted for two other bank robberies that he participated in and that no federal gun charges would be brought (369-370). Furthermore, in exchange for his cooperation in testifying for the government, the District Court was to be informed of the full extent of his cooperation at sentencing (370). Derrick admitted on direct examination that he was presently awaiting trial in the State Courts for attempted homi-

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* See Government Brief, *supra*, at 13, n * for a discussion of appellant's contention that the eyewitness identification was a fruit of an illegal arrest. There is equally no evidence that the identifications were a product of an unlawful detention.

** Appellant cites to *Pointer* v. *Texas*, 380 U.S. 400 (1965). While this case stands for the proposition that a defendant must be afforded the right to confront witnesses by means of an attorney, it has no relevancy on the issue of a witness' invocation of the Fifth Amendment as to other crimes not the subject matter of the trial.

cide and that his cooperation would also be made known to the state authorities (370, 381).

Upon cross-examination, appellant's attorney referred to the pending state case, and further asked if Derrick was a member of a gang called the "Seven Crowns" (381-382). Derrick answered affirmatively but at this point the government at side bar requested that the Court allow Derrick's attorney to be present to assert Derrick's fifth amendment rights in the event that this line of questioning related to Derrick's pending state charge on attempted homicide (382-383). When Derrick's attorney, Mr. Saloway was present, he invoked Derrick's right against self-incrimination on any questions concerning the "Seven Crowns" (419).

Clearly Judge Platt was justified in allowing Derrick to assert his constitutional privilege. The pending attempted homicide charge and Derrick's participation with the "Seven Crowns" were purely collateral matters having no bearing whatsoever upon the bank robbery charges. Derrick had already admitted the existence of the pending state charges which afforded counsel the benefit of undermining his credibility. Exploration of the details would be superfluous and would violate Derrick's rights against self-incrimination on his unrelated state indictment. *See United States* v. *Aiken,* 373 F.2d 294, 298 (2d Cir.), *cert. denied,* 389 U.S. 833 (1967); *United States* v. *Kahn,* 366 F.2d 259, 265 (2d Cir.), *cert. denied,* 385 U.S. 948 (1966); *United States* v. *Irvin,* 354 F.2d 192, 198 (2d Cir. 1965), *cert. denied,* 383 U.S. 967 (1966); *United States* v. *Cardillo,* 316 F.2d 606, 611 (2d Cir.), *cert. denied,* 375 U.S. 822 (1963); *United States* v. *Owens,* 263 F.2d 720, 722 (2d Cir. 1959).

Accordingly the testimony of Derrick was properly admitted.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: November 11, 1974

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 14th day of November 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a ~~N~~ ~~XXXXXXXXX~~ Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Frank A. Lopez, Esq.
31 Smith Street
Brooklyn, New York 11201

Sworn to before me this
14th day of November 1974

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4519466
Qualified in Kings County
Commission Expires March 30, 19[illegible]

Deborah J. Amundsen
DEBORAH J. AMUNDSEN

AFFIDAVIT OF PERSONAL SERVICES

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19___, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19___

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19___

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____

Attorney for _____

_____ Action No. _____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ is hereby admitted.
Dated: _____, 19___

_____
Attorney for _____

FPI-LC-5M-8-73-7355

U.S.A.v. FRITZ EMANUEL BASTIAN

74-2121

APPENDIX